FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 22 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 203

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES,
INDEPENDENT EXECUTRIX
Respondent

REPLY TO PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit

W. J. HOWARD,
J. E. PRICE,
J. V. WHEAT,
Attorneys for Respondent

ALPHA LAW PRINT CO., HOUSTON

INDEX

	PAGE
OPINIONS BELOW	2
STATEMENT	2
QUESTIONS TO BE DETERMINED	2
REASONS FOR DENYING THE PETITION	3
Reason I	3
Reason II	7
Reason III	12
Reason IV	12
Reason V	13
CONCLUSION	14
APPENDIX	18

CITATIONS

CASES:	PAGE
Commissioner v. Hofheimer (C.C.A. 2), decided May 25, 1945, not yet reported (#72561—Prentice Hall Federal Tax Service, Vol. 5, Current Court Decisions)	3, 4, 6, 9, 14
Dobson v. Commissioner, 320 U.S. 489, 64 S. Ct. 239	11
Mellon v. Driscoll, 117 F. (2d) 477 (C.C.A. 3), certiorari denied, 313 U.S. 579	3, 6, 7, 9, 14
Millard v. Maloney, 121 F. (2d) 257 (C.C.A. 3), certiorari denied, 314 U.S. 636	12, 13, 16
Porter v. Commissioner, 288 U.S. 436	12, 16
Sanford's Estate v. Commissioner, 308 U.S. 39	6
STATUTES:	
Internal Revenue Code, Sec. 811 (d) (2)	3, 4, 13, 18
Sec. 811 (d)	9, 13, 18
Sec. 811 (d) (1)	12, 13, 18
(26 U. S. C., Sec. 811)	
Revenue Act of 1936, Sec. 811	18
MISCELLANEOUS:	
Treasury Regulations 108: Sec. 86.3	5, 12, 16, 20
Treasury Regulations 105: Sec. 81.15	19
Sec. 81.20	12, 19
Randolph Paul, Federal Estate and Gift Taxation, Volume 1, p. 385, Sec. 7.09	5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 203

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX
Respondent

REPLY TO PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit

---

Lucy B. Holmes, Independent Executrix, on behalf of the Estate of Harry Holmes, Deceased, prays the Court to deny the Petition for Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, filed herein by the Solicitor General, on behalf of the Commissioner of Internal Revenue.

Opinions Below

The opinion of The Tax Court (R. 18-31) is reported at 3 T. C. 571. The opinion of the Circuit Court of Appeals (R. 65-69) has not yet been reported.

Statement

The Statement of Facts in the application is substantially correct, and may be summarized as follows:

Harry Holmes, on January 20, 1935, executed the Trust instrument naming himself as Trustee (with successors) and setting up three separate trusts for his three sons, Harry Holmes, Jr., John B. Holmes, and Thomas J. Holmes. Under each trust the trustee was directed to use the income therefrom for the respective beneficiary for fifteen years at which time such beneficiary should receive the corpus.

If any son died before the termination of the trust, leaving issue, such issue would receive the income until he reached the age of twenty-one years, when he would receive the corpus.

If any son died before termination of the trust, without issue or leaving issue who died before reaching the age of 21, such trust should enure to the beneficiaries of the other two trusts.

The Trustee or his Successor Trustee had the power to terminate any or all of the trusts prior to the end of the fifteen-year period and deliver the entire trust corpus to the beneficiaries then entitled to receive it.

Question to Be Determined

The Commissioner claims that this power of termination was the equivalent of a power to "alter, amend or revoke" so as to make the enjoyment of the trust subject to change

within the meaning of Sec. 811(d)(2) of the INTERNAL REVENUE CODE, and the trust property, therefore, includible in the grantor's estate.

The Tax Court held otherwise and was sustained by the Circuit Court of Appeals for the Fifth Circuit—holding that the power of termination under the facts and provisions of the trust instrument could only result in an acceleration of the time of enjoyment by the beneficiaries then entitled to receive the corpus under the terms of the original instrument and that the power of termination was, therefore, not the equivalent of a power to alter, amend or revoke.

Reasons for Denying the Petition

I.

Petitioner states as his first reason for granting the Writ that the decision below is in conflict with MELLON v. DRISCOLL, 117 F. (2d) 477 (C.C.A. 3), certiorari denied, 313 U.S. 579, and with COMMISSIONER v. HOFHEIMER (C. C. A. 2), decided May 25th, 1945, and not yet reported. (#72561—PRENTICE HALL FEDERAL TAX SERVICE, VOL. 5—Current Court Decisions.)

Respondent denies that there is any conflict between the decisions below and either MELLON v. DRISCOLL, or COMMISSIONER v. HOFHEIMER. The MELLON case was clearly distinguished by The Tax Court and petitioner does not discuss or even point out the alleged lack of "validity or significance" in the distinction. Petitioner has, in fact, failed to indicate how the facts were similar, or how the decisions differ as to applying the law.

The HOFHEIMER case was not decided for more than a month after the HOLMES case was decided, and therefore, could not have been discussed or considered by the court

below; also, the court in the HOFHEIMER case took no exception to the decisions in the HOLMES case.

We observe, however, that the MELLON case was one in which the Circuit Court found that a reserved right to "revoke" a particular trust was a right of revocation within the meaning of Sec. 811(d)(2). Petitioner does not even contend that the power of the trustee to terminate the trust in the instant case was the equivalent of a right of revocation.

The disinction of the facts in the HOLMES case from the MELLON case was so obvious and indisputable that the Circuit Court of Appeals merely approved the distinction as found by The Tax Court without repeating it. That the court below declined to follow a case decided upon admittedly different facts, is no evidence of a conflict, and certainly would not justify this Court in granting a WRIT of Certiorari.

In the MELLON case death changed the economic status of the beneficiaries so they were forever barred from participating in the corpus of the trust; before death, Mellon, Trustor, had the reserved right to "revoke the trust and distribute the corpus to the two beneficiaries." By his death they lost all chance to ever share in the corpus. The language of Mellon's trusts, which were involved in the case was as follows:

> "The Party of the first part hereby reserves the right, after six months written notice of his intention so to do, served on the party of the second part, to *revoke* this trust, whereupon the principal of the trust fund should be distributed to Thomas Mellon and Lucille Mellon Grange, and the trusts shall end." (Italics ours.)

Such distribution would have required, "a new conveyance of the corpus to the beneficiaries." (Tax Court Decision, R. 28.)

RANDOLPH PAUL, FEDERAL ESTATE AND GIFT TAXATION, Volume 1, page 385, Sec. 7.09, refers to MELLON v. DRISCOLL, stating:

> "and it has been held that power to revoke, which would change the beneficiaries' interests from life estates to absolute ownership, makes the grantor's estate taxable."

The court in the MELLON case correctly held, "a change in beneficiaries (citing cases) or a change in the amounts they are to take (citing cases) is sufficient."

In the HOLMES case, the original instrument irrevocably conveyed the corpus, subject to a fifteen-year trust. Neither the Trustee nor anyone else, could alter or revoke either—(1) the fifteen-year trust, (2) the conveyance of the corpus, or (3) change the amount any beneficiary was to take. Death alone of one or more beneficiaries without issue and within the fifteen-year term could effect a change in the amounts a beneficiary would take. Holmes, as Trustee, by the exercise of the power to terminate the fifteen-year trust, could only advance the time in which the beneficiaries then entitled to same, would receive the corpus in the exact shares as irrevocably conveyed in the Trust Instrument. This right in the Trustee to *terminate* the Holmes trust passed by the terms of the instrument, at his death, to the Successor Trustee, and Holmes' death made no change of any kind or character in the economic status of the beneficiaries or of Holmes' estate. The Successor Trustee stepped into Holmes Trustee's shoes with every right he had as Trustee prior to his death. There is here no power to change the beneficiaries or to change the amounts they are to take, but only a right to accelerate the time of the enjoyment.

TREASURY REGULATIONS 108, Section 86.3.—*Cessation of Donor's Dominion and Control*, reads:

> "*A gift shall not be considered incomplete, however, merely because the donor reserved the power to change the manner or time of the enjoyment thereof.* Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to such donee at the termination of the period, constitutes a completed gift."

The courts rightly consider the close relationship between the gift tax law and the estate tax law (SANFORDS ESTATE v. COMMISSIONER, 308 U.S. 39) and as The Tax Court said in this case:

> "If there would have been no imposition of the gift tax on his voluntary surrender of the right to terminate because there would have been no sufficient transfer of property to justify the tax, it is difficult to see how an estate tax would be imposed upon his involuntary cessation of such right by death. For reasons we have already stated, we think there was none" (R. 30).

The HOFHEIMER case is even more easily distinguishable on the facts. In that case the life tenant as first taker was a different person than the remaindermen, and the power of termination reserved to the Trustee-grantor would have the effect of *revoking* the life estate and vesting fee title in the remaindermen free from the life estate—certainly not only a revocation but clearly an *alteration*. Here was even more of an alteration than in the MELLON case.

Respondent believes a lack of conflict between the HOLMES case and the MELLON and HOFHEIMER cases must be admitted. Wherefore, Petitioner's First Point states no ground for granting the Writ.

II.

Petitioner's second reason for granting the Writ is a contention that the decision below was erroneous because the power of termination reserved to the Trustee (although not a power of revocation as in the MELLON case) was, nevertheless, the equivalent of a power which might have "altered or amended the transfer made and the interests thereunder" (Petitioner's Brief, p. 9, Par. 2).

Respondent disagrees completely with Petitioner's construction of the trust in his Argument on this point. Respondent's contention is, the instrument gave each of the beneficiaries a vested present estate which could not thereafter be altered, amended or revoked by either the Trustee or by any other earthly power, and that the right of the Trustee or Successor Trustee to terminate, could only effect an acceleration of the time of enjoyment of the trust corpus.

Petitioner's Argument is based on a false premise that Holmes' death, without exercising the power of termination brought about a change in economic status of the beneficiaries, or on the other hand, if Holmes' Trustee had exercised the power of termination, the result of that act would have brought about a change in the economic status of the beneficiaries; but the fact is, each of these remote, contingent, or putative beneficial interests on which the petition is based, were not in the slightest particular changed or affected by Holmes' death; *but each contingent, putative or other right Petitioner mentions, depends entirely on the death; not of Holmes, but on the death of one or more of the three beneficiaries, without issue and before fifteen years from the date of the trust.* This statement is true whether or not Holmes, Trustee, or the Successor Trustee, does or does not exercise the power of termination.

As The Tax Court said and the Circuit Court affirmed:

> "As we have already pointed out, the trust indenture here involved reserves the right to the grantor neither as an individual nor as a trustee to alter or amend the trust. He only had the right to terminate it and thereby accelerate the time that the beneficiaries might enjoy the corpus of the trust which had already been irrevocably given to them in the trust indenture" (R. 31).

Death always terminates any decedent's continued enjoyment of his property rights. Death of any of the beneficiaries of this trust prior to termination, without issue and within fifteen years, would cause the remainder to pass to other beneficiaries of the trust rather than to the heirs of the deceased beneficiary; but this was provided in the trusts instrument. This was the Trust and Holmes Trustee's right of termination, his termination, or his death without exercising the power, could in no way affect, change, or alter any beneficiary's right or property.

Any change in the economic status could result only from the death, without issue and prior to fifteen years after creation of the Trusts, of a *beneficiary* of the trust—the death of the grantor-trustee would have no bearing on it one way or the other. In other words, the beneficiaries had contingent remainders in the shares of other beneficiaries, if they died without issue and within fifteen years. But these contingent interests were created by the *original trust instrument*—they could not be altered, changed, amended or revoked by the grantor-trustee, or anyone else; they were *vested*. Death alone of a beneficiary without issue and within the fifteen-year term, could divest it.

Petitioner cannot contend that the decision below is erroneous except by contending that the holding in the MELLON case (on facts clearly distinguished) should be extended to cover the various contingencies imaginable as a result of

the *death* of any beneficiaries without issue, between the time of the exercise of the power and the fifteen-year period. It is true that the death of a beneficiary without issue, after any exercise of the power and prior to fifteen years, would change the enjoyment of the trusts property from what it would have been had there been no such death without issue.

Neither the MELLON case nor the HOFHEIMER case were concerned with any such "resulting" change brought about, not by the exercise of the power itself, but by a subsequent, uncontrollable and unanticipated contingency. Therefore, the Petitioner's contention that the decision below was erroneous has no authority to support it and must depend completely upon analysis of the Statute and Regulations, as applied to the facts at hand.

The purpose of the Estate Tax Law is to tax *property interest* passing at death from the decedent to his heirs or appointees. Section 811(d) was designed to prevent a decedent from avoiding the Estate Tax by pretending to transfer his property in trust, while actually reserving to himself powers to alter, amend or revoke the trust.

The Tax Court held that the power reserved to the Trustee in the Holmes' Trust was neither within the wording nor the spirit of the Section.

We give attention first to the question of whether the power violated the spirit of the Act.

Petitioner does not contend either in the Application for the Writ, or in any of the Courts below, that a pure and simple "acceleration" of the time of enjoyment would come within the spirit of the Act and does not attack the holding of the court below on that basis. At any time, however, the Trustee could conceivably exercise the power of termination, the acceleration of the time of enjoyment to the beneficiaries *then* entitled to receive, is the only thought which could

enter the mind of the Trustee or motivate his decision to exercise the power. The Trustee could not at any time he exercised the power, anticipate the happening of any of the remote contingencies or putative rights here relied upon by the petitioner, and if any change in economic status should ultimately result from the death of a beneficiary, after the exercise of the power, such change could not be said to have been directed by any volition or exercise of will by the Trustee. For example, he could not know or anticipate, at the time of the exercise of the power, whether he was depriving the terminated beneficiary of rights of survivorship in the other trusts, or whether he was depriving the other beneficiaries of rights of survivorship in the terminated trust —because the Trustee could not anticipate which, if any, of the beneficiaries might *possibly* die without issue within the period of time between the exercise of the power and the expiration of fifteen years.

Since the Trustee, at the time of the exercise of the power, could have no "intent" to *change* the beneficiaries or their economic status (except to accelerate), the Trustee reserved no such control over the property interest theretofore transferred by him as grantor as was contemplated in this Section of the Act. In other words, the Grantor did not reserve to himself any power by which he could evade or defeat the purpose of the Estate Tax Law by pretending to transfer his property while reserving to himself the right to thereafter, during his lifetime, alter, amend or revoke the enjoyment of the property.

The power involved does not violate the spirit of the Act, and likewise does not come within the wording thereof. The Act applies:

> "where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * * ."

It must be conceded in this case that the exercise of the power *itself* could bring about no change of enjoyment of any kind except the acceleration of the time of enjoyment.

The Regulation which petitioner alleges to control in this case simply explains that the Act applies to a power of alteration or revocation regardless of the "name" applied to the power in the trust instrument. In the absence of a death of any primary beneficiary, which incidentally was not likely in view of the ages (19, 24 and 27 in 1940, see Record p. 5), there would be no change in enjoyment regardless of the exercise of the power. It cannot be said, therefore, that any change could result through the exercise of the power—no change could result at any time in the absence of subsequent unforseeable contingencies. Neither the Statute nor the Regulations pretend to extend to changes of enjoyment brought about by contingencies not under the control of the decedent whether such contingencies might occur prior to the exercise of the power or afterwards.

As an example of remoteness, these contingent and putative interests had *no value* recognizable by law, because the life expectancy of each beneficiary was far in excess of the fifteen-year trust and durations of the power.

It cannot, therefore, be said that the decision of The Tax Court was contrary either to the spirit or the letter of the Act or the Regulations. On the contrary, The Tax Court had a right to conclude as a question of fact, or to say the least, as a mixed question of fact and law, that the power reserved to the decedent was not one which the Act intended to penalize, and this having been affirmed by the Circuit Court of Appeals, it is submitted that such decision is binding upon the Supreme Court in the absence of clear contradiction either in the statute or prior decisions. (DOBSON v. COMMISSIONER, 320 U.S. 489, 64 S. Ct. 239.)

III.

In his third reason for urging the granting of the Writ, petitioner argues that Section 81.20 of Treasury Regulations 105 is decisive of the case. If Congress intended Subsection (1) of Sec. 811(d) as merely *declaratory* of prior existing law, it is strange that Congress expressly made such section applicable only to transfers "after June 22, 1936" and that Congress re-enacted Subsection (2) without the word "terminate" and expressly made it apply to transfers "on or prior to June 22, 1936." Respondent does not quarrel particularly with the Regulation itself. It is true that it uses rather broad language in stating that the word "terminate" adds nothing to existing law prior to the amendment, but this broad statement is immediately thereafter, limited by the regulation itself to powers of termination "capable of being so exercised as to be the equivalent of a power to 'revoke' * * * (or) 'alter'."

It is not questioned that any power to revoke or alter (by whatever name it might be called) was covered by the old act; also, petitioner's interpretation of Regulation 105, Sec. 81.20 cannot be reconciled with Regulation 108, Sec. 86.3, referring to Completed Gifts, and herein quoted and discussed at pages 5-6 of this Brief. According to the interpretation of both regulations by The Tax Court in this case there is no conflict between them. Respondent believes the interpretation of these regulations which makes for harmony, should be followed.

Whereupon, Petitioner's Third Point states no ground for granting the writ.

IV.

Petitioner does not discuss his Fourth reason, and respondent will not discuss it at length. There is here no conflict with either of the two cases cited. (Petitioner's Brief, p. 12) PORTER v. COMMISSIONER, 288 U.S. 436; MILLARD v. MA-

LONEY, 121 F. (2d) 257 (C.C.A. 3), certiorari denied, 314 U.S. 636.

In each of those cases the Grantor reserved in himself a clear-cut power to change beneficiaries or alter the amounts they were to receive; and the MILLARD case simply followed the Supreme Court in the PORTER case in holding that the reservation of such power was directly within the wording of the Act, even though the Grantor could not use the power to benefit himself or his estate. In an entirely different fact situation the court below did not bring itself in conflict with either of those decisions by observing that the power of termination as provided in the Holmes Trust was not such as to constitute the equivalent of a power to revoke the trust and place the title or any economic interest back in the grantor or his estate.

This reasoning by the Circuit Court of Appeals was only used in distinguishing the facts in this case from those in the MELLON case, where Mellon-Grantor had reserved in himself the power to "revoke."

V.

The fifth reason given by the Petitioner for the granting of the Writ is that the reasoning of the Fifth Circuit Court in this case might be considered as precedent in the construction of Section 811 (d) (1) of the INTERNAL REVENUE CODE in construing "transfers made after June 22, 1936." This section specifically applied only to transfers made after June 22, 1936, and was not either applied or considered in the decision below which was concerned exclusively with Subsection (2) of Section 811 (d), which by its own terms, only covered transfers made prior to that date.

The Tax Court expressly eliminated such probability by stating (R. 29):

"But in transfers made on or prior to June 22, 1936, where the settlor has retained only a power to terminate the trust and has retained no power to revest in himself or in his estate any part of the trust corpus or to change or alter the disposition of the trust corpus already given to the beneficiaries under the terms of the trust indenture but only to accelerate the time of its enjoyment, we do not think the value of the trust corpus is includable under Section 811(d)(2), Internal Revenue Code, or any other provision of the Internal Revenue Code. *As to whether such transfers with such a power to 'terminate' as we have here made after June 22, 1936, would be includable in a decedent's estate under Section 81(d)(1), Internal Revenue Code, we express no opinion. We do not have that state of facts before us.*" (Italics ours.)

Certainly, this point is moot in the instant case, and is not a reason which this Court may properly consider in deciding whether to grant or deny the Writ.

Conclusion

1. It is submitted that the decision below was not in conflict with the decisions in either MELLON v. DRISCOLL, supra, or COMMISSIONER v. HOFHEIMER, supra, the facts being materially different and the facts in the latter two cases being directly within the wording and the meaning of the Act.

2. It is further submitted that the decision below was not erroneous for the following reasons:

(a) That part of the Act which applied to transfers prior to June 22nd, 1936, did not cover powers of "termination."

(b) The power of "termination" reserved in this case

could not be exercised in such a manner as to be the equivalent of a power to alter, amend or revoke within the meaning of the Act or Treasury Regulations, *because*

no change in economic benefits could possibly occur at the time of the exercise of the power as a result thereof;

any subsequent change in enjoyment could result only from the death of a beneficiary without surviving issue before the expiration of the fifteen-year period;

any change of economic status due to the death of a beneficiary without surviving issue and within fifteen years, would be wholly unconnected with and unaffected by the exercise of the power by Holmes, Trustee (or successor Trustee); and the death or the effect thereof would be entirely beyond his anticipation at the time of the exercise of the power and beyond his control;

any such change in enjoyment due to death of a beneficiary without surviving issue, would be so remote, uncontrollable and unforeseeable that it could not be said to be the result of any intent, volition or exercise of will by the grantor-trustee.

the contingent and putative interests upon which petitioner relies completely can have *no value* recognizable by law, since the life expectancy of each beneficiary exceeded the duration of the power;

(c) The existing authorities and Treasury Regulation with reference to the imposition of gift taxes support the conclusion of the court below that the mere acceleration of the time of enjoyment does not constitute a passing of property interest and is not such a change of enjoyment as was contemplated by the Act.

3. It is further submitted that the decision below is not contrary to Section 81.20 of Treasury Regulation 105 as the

meaning of the word "termination" is limited in the regulation itself to powers "capable of being so exercised as to be the equivalent of a power to 'revoke' * * * (or) 'alter';" and that the petitioner's contention that the word "terminate" used in the regulation should have been given an unlimited application involves an unreasonable and strained construction of the Regulation itself, brings the regulation in conflict with Section 86.3 of Treasury Regulations 108, and is in conflict with the obvious intent of the Act of Congress in omitting the word "terminate" from that part of the Act applying to transfers made "prior to June 22nd, 1936."

4. It is further submitted that the decision below was not in conflict with the decision of the Supreme Court in PORTER v. COMMISSIONER, supra, or with MILLARD v. MALONEY, supra, simply because the court below in determining that this power of termination was not the equivalent of a power of revocation, observed that upon exercise of the power in this case no title would revert to the Grantor.

5. It is further submitted that this Court should not take jurisdiction because of any possibility that the decision below might be cited as precedent in cases involving transfers made after June 22nd, 1936, because both the part of the Act applicable to the facts here, and the decisions in both courts below were expressly limited to transfers "made prior to June 22nd, 1936."

WHEREFORE, Respondent submits that the decisions of the Courts below were correct and are not in conflict with, but are in accord with the previous decisions of this Court, and of other Circuit Courts of Appeals; and Respondent prays

that the petition for Writ of Certiorari be in all things denied at Petitioner's cost.

W. J. HOWARD,

J. E. PRICE,

J. V. WHEAT,
Attorneys for Respondent,
13th Floor, Sterling Building,
Houston, Texas

APPENDIX

Internal Revenue Code:

See. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * *

(d) *Revocable transfers*—(1) *Transfers after June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

(2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under Paragraph (1) unless it is includible under this paragraph;

(26 U. S. C., Sec. 811.)

* * *

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

Sec. 81.15 *Tranfers during life.*—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: * * * (5) transfers under which the enjoyment of the transferred property was subject at decedent's death to a change through the exercise, either by the decedent alone or in conjunction with another person or persons, of a power to alter, amend, revoke, or terminate, or where such a power was relinquished in contemplation of decedent's death (see Sections 81.20 and 81.21).

* * *

Sec. 81.20. *Transfers With Power to Change the Enjoyment.*—(a) Transfers included.—Subsection (d) of Section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See Section 81.15.)

The addition to Subdivision (d) (1) of the Revenue Act of 1926, by Section 805 of the Revenue Act of 1936, of the phrase to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent (which phrase is also embodied in Subsection (d) (1) of Section 811 of the Internal Revenue Code), is considered merely declaratory of the meaning of the subdivision prior to the addition of the phrase.

The second phrase added to this subdivision of the Revenue Act of 1926 by amendment in 1936 (also embodied in Section 811 (d) (1) of the Internal Revenue Code), namely, "without regard to when or from what source the decedent

acquired such power," is not considered declaratory of the meaning of the subdivision prior to the amendment in a case in which no one of the powers enumerated in the subdivision was reserved at the time of the making of the transfer, but one or more thereof were conferred subsequent thereto (whatever the source from which conferred) without any understanding, expressed or implied, had in connection with the making of the transfer that such power or powers should be later conferred.

The third change made in the subdivision by the Revenue Act of 1936 (which is also embodied in Subsection (d) (1) of Section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke." Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."

Treasury Regulations 108, promulgated under the gift tax provisions of the Internal Revenue Code:

Section 86.3. *Cessation of Donor's Dominion and Control.* —A gift shall not be considered incomplete, however, merely because the donor reserved the power to change the manner or time of enjoyment thereof. Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to such donee at the termination of the period, constitutes a completed gift.